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No. 03-377

Supreme Court, U.S.
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# In the Supreme Court of the United States

KOONS BUICK PONTIAC GMC, INC.,

*Petitioner*,

v.

BRADLEY NIGH,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF OF THE AMERICAN BANKERS ASSOCIATION, THE AMERICAN FINANCIAL SERVICES ASSOCIATION, AND THE CONSUMER BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

## INTEREST OF THE *AMICI CURIAE*[1]

The issue in this case is whether Congress intended to eliminate the $100/$1000 statutory civil liability limitation, contained in subparagraph (A) of 15 U.S.C. § 1640(a)(2), on statutory penalties for non-mortgage, non-lease violations of the Truth in Lending Act (TILA). *Amici curiae* have been present and involved throughout the initial enactment of and subsequent amendments to TILA. *Amici* also represent thousands of financial institutions – which, as consumer lenders, risk being subjected to civil penalties that are an order of magnitude greater than the maximum that Congress intended or enacted, for technical violations of TILA and its interpreting regulations. For these reasons, *amici* are well situated to brief the Court on the proper interpretation of Section 1640(a)(2)(A).

*Amicus curiae* American Bankers Association (ABA) is the largest national trade association of banks in the United States. The ABA represents approximately 90 percent of the domestic assets of United States banks, with members located in all fifty States and in the District of Columbia. ABA members include banks of all types and sizes – including money-center banks, regional banks, and community banks. The ABA frequently appears in litigation as *amicus curiae* in cases raising issues of widespread importance to banks or consumers of banking services.

*Amicus curiae* American Financial Services Association (AFSA) is the national trade association for finance companies and other consumer lenders that raise funds in the capital markets. Founded in 1916, AFSA has approximately 360

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

member companies operating more than 10,000 offices throughout the United States, all engaged in the extension of consumer credit. On behalf of its members, AFSA monitors legislative, regulatory, and judicial actions affecting the market-funded finance industry, and participates as *amicus curiae* in litigation to ensure that the courts are apprised of relevant and accurate industry information.

*Amicus curiae* Consumer Bankers Association (CBA) was founded in 1919 and has as members most of the Nation's largest bank holding companies, as well as regional and super community banks, that collectively hold two-thirds of the banking industry's total assets (in excess of $2.9 trillion). Its member institutions are the leaders in consumer financial services, including auto finance, home-equity lending, credit cards, education loans, small business services, community development, investments, deposits, and delivery. Through its Government Relations Department, CBA advocates on behalf of its membership on issues before the regulatory agencies, the Legislative Branch, and the courts, including issues relating to TILA.

*Amici* have a strong interest in reversal of the decision below because of the harmful impact that the Fourth Circuit's rule would have on the consumer credit industry. A holding that the $100/$1000 statutory civil liability provision applies (as it always has) to all of subparagraph (A) of Section 1640(a)(2), with the exception since 1995 of an explicitly carved-out clause (iii) for a subset of consumer loans, will right Congress's carefully crafted balance, both protecting consumers from inappropriate lending practices and permitting responsible lenders to conduct their business without fear of excessive liability for technical violations.

## STATEMENT

This case requires the Court to interpret 15 U.S.C. § 1640(a)(2)(A), which establishes minimum and maximum statutory civil liability for individual borrowers claiming harm from a violation of TILA or its implementing Regulation Z, 12



C.F.R. Part 226. Section 1640, TILA's civil liability provision, has nine subsections, (a)-(i). Subsection (a), which states allowable damages, has four paragraphs, (1)-(4), which provide for, among other things, actual damages and attorneys' fees. Paragraph (2) of subsection (a), which provides for civil penalties that are added to any actual damages and allowable attorneys' fees, has two subparagraphs, (A) for individual actions and (B) for class actions. Subparagraph (A) has three clauses, (i)-(iii), and specifies the following civil penalties:

> (A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000.

The subparagraph contains two minimum/maximum statutory liability provisions – $100/$1000 for most loans and leases under subparagraph (A) – or, according to the courts below, for only a small portion of the subparagraph – and $200/$2000 for the subset of consumer loans carved out for special treatment in clause (iii).

There is no dispute that, when TILA was enacted in 1968, the $100/$1000 statutory liability provision, stated by the phrase "except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000," was included in substantially identical form and applied only to consumer loans that are contained in clause (i). And there is no serious dispute that even after Congress in 1976 added clause (ii) with a provision for consumer leases, but before the 1995 amendments to TILA, liability for run-of-the-mill consumer loan transactions under clause (i) – including loans for automobiles, credit card

borrowing, and home-equity lines of credit – remained subject to the $100/$1000 provision. But the courts below held that, when Congress amended TILA in 1995 to add clause (iii) – intending only to increase the civil liability for violating TILA in the case of the subset of consumer loans that it placed in clause (iii) – it also narrowed the application of the $100/$1000 provision to clause (ii) only.

### A. The Truth in Lending Act

Congress enacted in 1968 a system of mandatory disclosures by consumer lenders in order to overcome the asymmetry of information in consumer lending transactions. See Pub. L. No. 90-321, 82 Stat. 146 (1968). The Federal Reserve Board was given interpretive authority (15 U.S.C. § 1604), and has promulgated Regulation Z, contained in the Code of Federal Regulations at 12 C.F.R. Part 226. Under TILA and Regulation Z, lenders are required to make highly specific factual disclosures to borrowers "before the credit is extended" (15 U.S.C. § 1638(b)(1)). See 15 U.S.C. §§ 1637, 1637a, 1638; 12 C.F.R. Part 226.[2] Regulations govern, among other things, the relative size of type on disclosures that are required to be made in written form; specific verbiage required to be used in the disclosures; the type of information that may be provided together with the disclosures; whether certain disclosures must be written, or may be given orally; at what point in the transaction the disclosures must be made; when (and whether) disclosures must be updated; and whether written disclosures must be given to the borrower to keep, or merely to view. See 12 C.F.R. §§ 226.5a, 226.5b, 226.17.

[2] The Board's interpretative authority does not extend to the civil liability provisions of Section 1640, so Regulation Z is related to the issue before this Court only insofar as it shows the extensiveness and complexity of the regulatory scheme and the high potential for technical violations that cause no actual damages and thus will make paragraph (2) of Section 1640(a) the operative damages provision. One sub-issue before the courts below was whether petitioner could be liable at all for a TILA violation when the errors were made in an early version of the auto-loan contract that never became binding on respondent, and the Board has defined "consummation" – the point at which TILA liability attaches – to be the "time that a consumer becomes contractually obligated on a credit transaction." 12 C.F.R. § 226.2. As one court noted, holding the transaction to have been "consummated" when no formal agreement was reached does violence to the interpretation of consummation promulgated by the Board. See *Bragg* v. *Bill Heard Chevrolet, Inc.*, 245 F. Supp. 2d 1235, 1238 (M.D. Fla. 2003) (discussing the decision below).



Congress established criminal, administrative, and private civil enforcement schemes for TILA. RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING ¶ 13.01, at 885 (Robert A. Cook *et al.*, eds., 2000). Congress intended that administrative enforcement be the primary mechanism to ensure compliance with TILA disclosure requirements. See H.R. REP. NO. 90-1040, 90th Cong., 1st Sess. (1967), reprinted in 1968 U.S.C.C.A.N. 1962, 1976. Thus, the Federal Reserve Board and other agencies were given enforcement authority over different classes of TILA creditors. See 15 U.S.C. § 1607. Criminal penalties for a "willful[] and knowing[]" TILA violation include fines up to $5000 and up to one year of imprisonment. *Id.* § 1611. And in Section 1640, as amended in 1974, 1976, 1980, and 1995, Congress permitted a successful TILA plaintiff to recover the actual damages (if any) suffered because of the violation; in addition to one of (1) twice the amount of the finance charge, with a minimum of $100 and a maximum of $1000 for garden-variety consumer loan and lease transactions; (2) minimum $200, maximum $2000 for a subset of consumer loans that gathered special congressional concern in 1995; or (3) $500,000 or 1 percent of the creditor's net worth, with no per-borrower minimum, for class actions. The only issue in this case is whether garden-variety loan transactions were excepted from the $100/$1000 provision by the 1995 amendment to TILA.

Until the decision below, one federal court of appeals had addressed the $100/$1000 provision. The Seventh Circuit held that the meaning of clauses (i) and (ii) (which it termed "subparts") remained untouched by the addition of clause (iii). See *Strange* v. *Monogram Credit Card Bank*, 129 F.3d 943, 947

(7th Cir. 1997). In *Strange*, it was the statutory minimum liability that was at issue; twice the finance charge in that case came to $54.72. *Id.* at 945. Because "the 1995 amendment was designed simply to establish a more generous minimum and maximum for certain secured transactions, without changing the general rule on minimum and maximum damage awards for the other two parts of § 1640(a)(2)(A)" (129 F.3d at 947), "the 'subparagraph' mentioned in § 1640(a)(2)(A)(ii) continues to encompass what is now codified as subparts (A)(i) and (A)(ii), not just subpart (A)(ii)" (129 F.3d at 947).

### B. The Facts and Proceedings in this Case

Respondent Bradley Nigh sought to buy a Chevrolet Blazer from petitioner Koons Buick Pontiac GMC, Inc. He entered into a "spot sale" transaction: in exchange for a $4000 down payment, a trade-in, and an agreement to enter into a loan transaction if petitioner could find a lender, respondent got to take the Blazer home immediately. In such a transaction, the ultimate loan agreement is between the buyer and a consumer lender other than the seller – but, though it is not in fact the lender, the seller nevertheless is the statutory "creditor" under TILA. 15 U.S.C. § 1602. Initially, petitioner could not find financing for respondent at the quoted rate; later, errors were discovered in the paperwork; and respondent never actually became contractually obliged to pay on a loan until the third attempt to reach an agreement. Pet. App. 3a-4a. Respondent ultimately sued petitioner in federal court, alleging violations of TILA and Regulation Z (as well as state-law claims) and seeking statutory damages and attorneys' fees.

Judge Gerald Lee of the Eastern District of Virginia awarded summary judgment to Koons Buick on its breach-of-contract counterclaims against respondent Nigh and on several of Nigh's claims. The suit was tried to a jury on the TILA claim and a Virginia Consumer Protection Act (VCPA) claim. Pet. App. 2a. Over objections by counsel for Koons Buick, Judge Lee instructed the jury that, if it found that Koons Buick violated TILA, it was required to award twice the finance



charge – without regard to the $1000 cap on liability that always had applied to consumer loans under clause (i). Pet. 9. The jury awarded Nigh $24,192.80 on the TILA claim and $4000 on the state-law claim. Judge Lee then awarded Nigh attorneys' fees and court costs totaling $26,129.10. Pet. App. 53a. The total liability came to more than $54,000, even though Nigh had suffered no actual damages; the TILA claim was a strict-liability claim requiring no proof of bad intent on the part of Koons Buick; there was no evidence of "repeated willful violations" of state law, so Judge Lee found no need for deterrence (Pet. App. 45a); and only $4000 ever changed hands in the transaction at issue.

On appeal, the Fourth Circuit panel majority assumed that the word "subparagraph" could mean *any* subdivision of Section 1640 – so that "this subparagraph" could just as easily mean clause (ii) as subparagraph (A). The majority also expressed indifference to objective indicia of Congress's intent in Section 1640, as it is manifested anywhere outside the specific language of subparagraph (A) of Section 1640(a)(2). "Our responsibility is thus not to determine whether there is evidence that 'Congress intended to override the Fourth Circuit's' precedent (or any circuit precedent for that matter)." Pet. App. 12a (quoting the dissent). "It could well be, as Judge Gregory concludes [in dissent], that Congress did not intend to alter the statutory cap applicable under subparagraph (A)(i) when it amended the statute in 1995." *Id.* at 13a. "Of course, it goes without saying, if Congress enacted into law something different from what it intended, then it can simply amend the statute to bring the statute in line with congressional intent." *Ibid.* The panel did not address the Seventh Circuit's decision in *Strange*, but held that, by singling out the subset of loans formerly covered by clause (i) for specialized treatment (with a "new maximum and minimum" (*id.* at 11a)) in clause (iii), Congress amended the minimum and maximum liability provisions applicable to clause (i) as well. *Ibid.*

Judge Gregory dissented, asserting three primary quarrels with the majority's reasoning. *First*, the facts that the $100/$1000 provision had applied to both clauses (i) and (ii) since clause (ii) was added in 1976, and Congress did nothing to amend those clauses, compelled the conclusion that the $100/$1000 provision still applies to clauses (i) and (ii). Pet. App. 19a. *Second*, Judge Gregory pointed to inconsistencies that the panel's new interpretation created within Section 1640(a)(2). Because the "under this subparagraph" language was *not* included in the newly appended clause (iii), the new clause was structured differently from the pre-existing ones. Also, the phrase "under this subparagraph" was included in subparagraph (B) of Section 1640(a)(2), and clearly referred to all of subparagraph (B). To limit "subparagraph" to clause (ii) in the first instance, but to interpret it to mean all of subparagraph (B) in the second, created an internal inconsistency in the majority's interpretation of the statute. *Id.* at 21a.

*Third*, Judge Gregory would have followed an interpretation that did not change the meaning of the word "subparagraph." Pet. App. 20a-21a. He believed that if it previously meant all of (A), it still meant all of (A), except that (iii) had been enacted as a specific exception. *Id.* at 19a-20a & n.2. The majority responded to this argument, disagreeing with Judge Gregory because in its view he treated "subparagraph" as "a term of art not referencing a distinct subparagraph at all." *Id.* at 12a. Although Judge Gregory's opinion flirted with the issue, and the Seventh Circuit in *Strange* drew a distinction between "subparagraph" (A) and what it termed "subparts" (i), (ii), and (iii), none of the opinions below considered seriously whether words like "subparagraph" and "clause" have consistent meaning in legislative drafting.

## SUMMARY OF ARGUMENT

The decision of the Fourth Circuit majority below is in error for several independent but complementary reasons. Initially, the majority purported to conduct a plain-meaning interpretation of the civil liability provisions of TILA, but



instead undertook a myopic analysis of one subparagraph of TILA, concluding that the separation of the statutory liability provision by a comma from one clause rendered it applicable only to that clause. The court undertook no effort to achieve the natural reading of the section, or to construe it "reasonably, to contain all that it fairly means." ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (1997).

The error is confirmed by a plain-meaning analysis of the subparagraph that respects all the terms of the subparagraph, TILA generally, and in fact the broader structure of the U.S. Code. Congress used the phrase "under this subparagraph," rather than "under this paragraph" (as the phrase read before the 1974 amendments) or "under this clause" (as would be required to limit the liability provision only to part of subparagraph (A)). Congress did so for a reason, and interpreting the $100/$1000 limitation to apply to all of subparagraph (A), with the exception of a specific carve-out in clause (iii), respects the phrase "under this subparagraph" as it is used throughout TILA and throughout the U.S. Code.

This plain-meaning analysis also respects Congress's clear intent throughout the enactment and amending of TILA. The court below disavowed any responsibility to consider Congress's intent when interpreting the statute. Pet. App. 12a, 13a. But a proper consideration of the "'objectified' intent" expressed by the language of the statute and its amendments (see SCALIA, *supra*, at 17), or of the overwhelming and clear evidence of intent reflected in the legislative history of TILA and its amendments, would have precluded the court of appeals' construction. Congress's intent is crystal clear that its use, and retention, of "subparagraph" to refer to (A) has substantive meaning, and that the amendments to Section 1640 since 1968 have not narrowed the breadth of the $100/$1000 provision.

The triumph of the natural reading of subparagraph (A) over the reading accepted by the majority below is demonstrated further by considering the absurd results under the Fourth Circuit's interpretation – under which class action liability,

liability for bad-faith conduct in consumer lease transactions, and criminal punitive liability all are likely to be much *less* than the liability imposed in this case. Interpreting the statute to apply the $100/$1000 provision to clause (i) as well as clause (ii) produces defensible results.

Finally, the Fourth Circuit's cavalier disregard for its interpretive responsibilities below risks placing in turmoil an industry that is central to the smooth operation, and to the recovery, of the U.S. economy. While doing nothing to advance broader policies underlying TILA, and in the name of "deference" to Congress's ability to amend the statute, the court imposed a scheme that threatens to harm consumer credit severely.

## ARGUMENT

Although this case comes before the Court as a pure exercise of interpretation, arguably the Court's task of construing 15 U.S.C. § 1640(a)(2)(A) is not even one of statutory construction. "When we talk of statutory construction we have in mind cases in which there is a fair contest between two readings, neither of which comes without respectable title deeds." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 527 (1947). This is not such a case. Only "literal perversity or jaundiced partisanship can sponsor [the] particular meaning" (*ibid.*) of TILA urged by respondent and adopted by the court below. That interpretation triumphs the use of a comma over the plain meaning of the language Congress employed, the meaning given to that same language elsewhere in the same statute, the structures of Section 1640 and of TILA, the history of the enactment of and amendments to Section 1640, and the interpretations given to the section by the near unanimity of courts and commentators.

In addition, the interpretation that the court below gave to Section 1640(a)(2)(A) threatens such harm to the consumer lending industry that it does violence to any understanding of responsible public policy.



### I. The Decision Below Cannot Be Reconciled with the Plain Meaning of Section 1640(a)(2)(A) or with the Congressional Intent Underlying TILA

A. In *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 454-455 (1993), it was quotation marks. In this case, it is a comma: The majority below held that the $100/$1000 limitation in subparagraph (A) was placed "wholly within (ii)" (Pet. App. 11a), and respondent defends that holding by arguing that "the limitations in (ii) are separated from the first two types of award calculations only by a comma" (Br. in Opp. 9-10). In both cases, this Court was faced with arguments that the use of punctuation overrode the natural reading of the respective statutes. This Court unanimously corrected the D.C. Circuit's error in 1993. Respondent's comma-based argument supporting the holding below ignores this Court's unequivocal guidance:

> A statute's plain meaning must be enforced, of course, and the meaning of a statute will typically heed the commands of its punctuation. But a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning.

*United States Nat'l Bank of Oregon*, 508 U.S. at 454.

This Court does not hesitate to reject purported "plain-meaning" analyses that produce patently absurd results. See, *e.g.*, *United States Nat'l Bank of Oregon*, 508 U.S. at 454; *Nixon* v. *Missouri Municipal League*, 124 S. Ct. 1555, 1561 (2004) (rejecting an absolutist interpretation of the phrase "any entity" when that interpretation produced "strange and indeterminate results").[3] In this case, not only is the supposed plain meaning that relies on punctuation insupportable, there *is* a plain meaning of Section 1640(a)(2)(A), supported by the words

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[3] This mode of construction has a long pedigree: "[T]here is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen* v. *Ward*, 279 U.S. 337, 339 (1929) (Holmes, J.).

Congress used, that respects Congress's clear intent. When such a "natural reading" appears and is consistent with other applicable principles of statutory interpretation, this Court will follow it. *General Dynamics Land Systems, Inc.* v. *Cline*, 124 S. Ct. 1236, 1240 (2004); *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001).

1. Instead of blindly pursuing a reading supported by the purported placement of the $100/$1000 limitation within clause (ii), the court below should have inquired into the natural reading of TILA – of which the punctuation and structure of subparagraph (A) of Section 1640(a)(2) are only component parts. "Along with punctuation, [statutory] text consists of words living 'a communal existence,' in Judge Learned Hand's phrase, the meaning of each word informing the others and 'all in their aggregate taking their purport from the setting in which they are used.'" *United States Nat'l Bank of Oregon*, 508 U.S. at 454 (quoting *NLRB* v. *Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941)). The natural reading of subparagraph (A) is achieved by treating its interpretation as "a holistic endeavor." *United Savs. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

The natural reading of subparagraph (A) applies the $100/$1000 statutory liability provision to the whole subparagraph (but for the carved-out clause (iii)), *not* merely to the second clause. Contrary to respondent's belief (Br. in Opp. 9-10), nothing about the fact that "only * * * a comma" separates the $100/$1000 statutory liability provision from clause (ii) renders the provision inapplicable to clause (i); in fact, clause (i) itself is separated from clause (ii) "only by a comma," rather than some "stronger" punctuation mark (such as a semicolon or a period).

And it is a common method of sentence construction to use a comma to separate a modifying phrase from a list of objects being modified. Thus,



> I went to the store to buy butter, eggs, flour, sugar, cinnamon, nutmeg, and apples, which can be used to make an apple pie, and vanilla ice cream.

Under the analysis of the panel below, and the analysis that respondent urges on this Court, the modifying phrase applies *only* to apples, because it is separated from the remainder of the sentence "only by a comma." Apparently respondent believes the hearer should assume that only apples are required to make apple pie. But like subparagraph (A), the apple pie recipe demonstrates that "the meaning of a sentence is to be felt rather than to be proved." *United States* v. *Johnson*, 221 U.S. 488, 496 (1911) (Holmes, J.). If the sentence is read naturally, the modifying clause above refers to the entire list, and at worst there is an ambiguity that readily can be clarified through further inquiry – "can you make an apple pie with only apples, or do you need all those things?" The constricted interpretation of TILA by the panel below, based on the fact that the modifying phrase in subparagraph (A) follows a list of clauses being modified, stopped short of asking this next question.

2. The natural reading of TILA is precisely a "textualist" interpretation – construing the statute "reasonably, to contain all that it fairly means." SCALIA, *supra*, at 23. Congress did not leave Section 1640, much less all of TILA, without substantial aids to interpretation, which clarify any possible ambiguity created by the punctuation and structure of subparagraph (A) as to the breadth of application of the $100/$1000 limitation. The clearest indication of the breadth of the $100/$1000 provision is the statute's express command that it applies to liability "under this subparagraph." Section 1640(a)(2)(A).

Like other words in TILA, "subparagraph" has meaning – in fact, it means the statutory unit designated by a capital letter in parentheses – thus, "(A)."[4] According to the *United States*

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[4] "[G]ood legislative drafting is characterized by a clear expression of intent, using a consistent terminology throughout." M. Douglass

*Congress Data Dictionary of Legislative Documents*, a "sub-paragraph" is

> [a] hierarchical structure of a measure. This level is contained directly within paragraphs. Levels contained within subparagraphs are clauses, subclauses, items, and subitems. Subparagraphs are normally enumerated with an uppercased alpha character within parentheses (*e.g.*, (A)).

See http://xml.house.gov/subparagraph.html. The same source describes "sections," "subsections," "paragraphs," "clauses," "subclauses," and so on, with the result that the descriptive terminology used by Congress for the structure of legislation is abundantly clear:

> 1640 is a "section";
>
> (a) is a "subsection";
>
> (1) is a "paragraph";
>
> (2) is a "paragraph";
>
> (A) is a "subparagraph";
>
> (i) is a "clause";
>
> (ii) is a "clause";
>
> (iii) is a "clause."

See *ibid.* The phrase "under this subparagraph," then, could refer only to subparagraph (A) – *not* to clause (ii).

It is important to recognize Congress's intent correctly when it uses internal cross-references. As the *Data Dictionary* explains, subparagraph is a "[u]nique name for the element so that it can be referenced." *Ibid.* And Congress does use these statutory elements for cross-referencing. A quick search of the

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Bellis, *Drafting in the U.S. Congress*, 22-1 STATUTE L. REV. 38, 43 (2001). Mr. Bellis in 2001 was the Deputy Legislative Counsel for the House of Representatives Office of Legislative Counsel. *Id.* at 38 n.1.



Westlaw database demonstrates that internal references to sections, subsections, paragraphs, subparagraphs, clauses, and subclauses are used multiple thousands of times throughout the United States Code. Section 1640 alone makes numerous internal cross-references that make sense only if the reader accords the proper, and consistent, meaning to the words "subparagraph," "paragraph," "subsection," "section," "title," "part," and "subchapter."

To pick one example, subsection (b) of Section 1640 permits a creditor to escape liability under TILA – "[a] creditor * * * has no liability *under this section* or section 1607 of this title or section 1611 of this title" – if the creditor timely discovers and corrects any TILA violation. 15 U.S.C. § 1640(b) (emphasis added). If "section" were given variable meaning, as "subparagraph" was in the courts below, "under this section" might be thought to refer only to *subsection* (b)[5] – so liability still might attach under subsection (a) of Section 1640, despite the subsection's unambiguous command that creditors be insulated from administrative, criminal, *and* civil liability. Of course that result is ridiculous; "under this section" in subsection (b) clearly refers to the civil liability provisions of Section 1640. But the example shows how ignoring the static meaning of these exceptionally common internal references threatens untoward results in interpreting all of TILA, as well as a vast array of statutes.

3. The Court need look no further to resolve this issue than the static definition that Congress accords to the word "sub-paragraph." But multiple other indicia of meaning are available to understand Congress's use of "subparagraph" within TILA. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the

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[5] Just as clause (ii) meets the *Webster's Dictionary* definition of "subparagraph," subsection (b) fits the dictionary definition of "section." See WEBSTER'S NEW WORLD DICTIONARY 1213, 1332 (3d College ed. 1988) (definitions of "section" and the prefix "sub-").

same terminology is used elsewhere in a context that makes its meaning clear." *Timbers of Inwood Forest*, 484 U.S. at 371. As Judge Gregory noted in dissent below, Congress used the phrase "under this subparagraph" in subparagraph (B) as well:

> This reading is made even more compelling when one considers that the phrase "under this subparagraph" in § 1640(a)(2)(B) indisputably applies to all of subparagraph (B). Similarly, the statutory cap following (2)(A)(ii) applies to all claims under subparagraph (A), with the exception of claims under (2)(A)(iii), which contains its own, discrete limit.

Pet. App. 21a. Other examples of Congress's consistent use of "subparagraph" abound throughout TILA. See, *e.g.*, 15 U.S.C. § 1602(aa)(2)(A) ("under this subparagraph"), (B) ("under subparagraph (A)"), (C) ("in subparagraph (A)"); *id.* § 1605(f)(2)(A) ("in subparagraph (B)"); *id.* § 1606(a)(1)(B) ("under subparagraph (A)"). And in the Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, 109 Stat. 271 – the statute that the panel majority below held altered the meaning of the word subparagraph (Pet. App. 12a) – the one time that Congress used the term "subparagraph," it was using the word as it is defined in the *Data Dictionary*. See Pub. L. No. 104-29, § 3 ("except as provided in subparagraph (B)") (amending 15 U.S.C. § 1605).

B. The legislative history of Section 1640 also compels the conclusion that the $100/$1000 statutory liability provision applies to all of subparagraph (A), except for the specifically carved-out clause (iii).

1. Congress knows how to change the designations "paragraph," "subparagraph," and "clause," when amendments to a statute require it, and has done so numerous times when amending TILA. As enacted in 1968, the TILA civil liability provision (Section 1640) read:

> (a) Except as otherwise provided in this section, any creditor who fails * * * to disclose to any person any information required * * * to be disclosed to that person is liable to that person in an amount equal to the sum of
>
> (1) twice the amount of the finance charge in connection with the transaction, except that the liability *under this paragraph* shall not be less than $100 nor greater than $1000; and
>
> (2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.



Pub. L. No. 90-321, § 130 (emphasis added), quoted in Elwin Griffin, *The Truth and Nothing but the Truth: Confronting the Challenge in the Truth in Lending Act and Regulation Z*, 40 HOUS. L. REV. 345, 413 n.451 (2003). In 1974 Congress added an actual damages provision, which became paragraph (1), changed the former paragraph (1) to (2), and changed the former paragraph (2) to (3). See Pub. L. No. 93-495, § 408, 88 Stat. 1500, 1517-1518 (1974), cited in Griffin, *supra*, at 413 n.451.

Congress also added a class-action liability maximum of $100,000 (since changed to $500,000) or one percent of the creditor's net worth, and bifurcated the new paragraph (2) into subparagraphs (A) and (B). See Pub. L. No. 93-495, § 408, 88 Stat. at 1517-1518, cited in Griffin, *supra*, at 413 n.451. As amended, paragraph (2) provides for liability in the amount of:

> (2)(A) in the case of an individual action twice the amount of any finance charge in connection with the transaction, except that the liability *under this subparagraph* shall not be less than $100 nor greater than $1,000; or
>
> (B) in the case of a class action, such amount as the court may allow, * * * and the total recovery in such action shall not be more than the lesser of $100,000 or 1 per centum of the net worth of the creditor.

*Ibid.* (emphasis added).[6] In these amendments, Congress changed "paragraph" to "subparagraph" as required to preserve the consistent meaning of the internal references.[7]

2. After TILA was amended in 1974 (adding the actual damages and class-action provisions), the statutory liability provision was contained in subparagraph (A), and there were no clauses (i), (ii), and (iii). Also, the statute did not cover consumer leases. This changed in 1976, when Congress passed the Consumer Leasing Act, adapting the TILA civil liability provisions to violations in consumer lease transactions. See Pub. L. No. 94-240, § 4, 90 Stat. 257, 260 (1976) (amending Section 1640(a)(2)(A) by "insert[ing] '(i)' after '(A)', and insert[ing] after 'transaction' a comma and the following: 'or (ii) in the case of an individual action relating to a consumer lease'"certain limitations). After 1976, subparagraph (A) read:

> (A)(i) in the case of an individual action twice the amount of the finance charge in connection with the transaction, or
>
> (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1000.

Like subparagraph (A) currently, the $100/$1000 statutory liability provision was separated "only by a comma" from the

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[6] Subparagraph (B) was amended in 1976 to raise the maximum liability for class actions to $500,000 or one percent of the creditor's net worth (Pub. L. No. 94-240, § 4(2), 90 Stat. 257 (1976)), and again in 1980 to add the phrase "under this subparagraph in any class action [or] series of class actions arising out of the same failure to comply by the same creditor" (Pub. L. No. 96-221, § 615(1), 94 Stat. 132 (1980)).

[7] Congress did so at least one other time in Pub. L. No. 93-495. "Section 130(c) of such act (15 U.S.C. § 1640(c)) is amended by striking out "chapter" and inserting in lieu thereof "title." Pub. L. No. 93-495, § 407(c).



text of clause (ii), so TILA as amended in 1976 contained the same arguable ambiguity – which exists only if one ignores the meaning of the statutory term "subparagraph" – as to whether the $100/$1000 provision reached clause (i) as well as clause (ii). But given Congress's ability, demonstrated just two years before, to change "subparagraph" to "clause" if it chose, its failure to do so must have meaning. "It was not surprising that Congress retained the word 'subparagraph' because section 130(a)(2) [Section 1640(a)(2)] still contained two subparagraphs, (A) and (B)." Griffin, *supra*, at 414 n.453.

There is another reason to understand the 1976 amendments not to alter the application of the statutory liability cap to clause (i). The Consumer Leasing Act "incorporate[d] the civil penalty provisions of the existing Truth in Lending Act." S. REP. NO. 94-590, 94th Cong., 2d Sess. 8 (1976), reprinted in 1976 U.S.C.C.A.N. 431, 438. The civil penalty for violations of the Consumer Leasing Act "is intended to represent a civil penalty equivalent in dollar amount to that imposed on other creditors." *Ibid.* Interpreting the $100/$1000 provision as applying only to clause (ii) would not be "incorporat[ing]," but coopting.

Perhaps because of this unequivocal legislative history, courts were not confused before 1995. See, *e.g.*, *Purtle* v. *Eldridge Auto Sales, Inc.*, 91 F.3d 797, 800 (6th Cir. 1996); *Cowen* v. *Bank United of Texas*, 70 F.3d 937, 941 (7th Cir. 1995); *Mars* v. *Spartanburg Chrysler Plymouth*, 713 F.2d 65, 67 (4th Cir. 1983); *Dryden* v. *Lou Budke's Arrow Fin. Co.*, 661 F.2d 1186, 1191 n.7 (8th Cir. 1981).[8]

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[8] Respondent appears to contend that, contrary to the unanimous interpretation by the courts of appeals, the pre-1995 version of Section 1640(a)(2)(A) should be read to apply the $100/$1000 statutory liability provision only to clause (ii) of subparagraph (A). See Br. in Opp. 10-11 ("Yet it is equally plausible that Congress intended either to correct the erroneous assumption (reflected in *Mars*) that the limits stated at the end of (ii) applied to damages under (i)."). Under respondent's view, then, Congress removed the statutory liability provision with the Consumer Leasing Act, in 1976. That view cannot be reconciled with

3. Congress again amended Section 1640 in 1995. See Pub. L. No. 104-29, § 6. Congress was concerned about "the difficulty of proving actual damages and the increase in costs involved in *mortgage* lending." H.R. REP. NO. 104-193, 104th Cong., 1st Sess. 99 (1995) (emphasis added).

Congress's especial concern resulted in carving the subset of "credit transaction[s] not under an open end credit plan that [are] secured by real property or a dwelling" out of clause (i), and placing them in a new clause (iii). See Pub. L. No. 104-29, § 6. This carve-out was necessary only because Congress decided to *increase*, to $200 minimum and $2000 maximum, the statutory civil liability for violations of TILA in this subset of consumer loan transactions. When creating clause (iii), Congress moved the "or" from between clauses (i) and (ii), to between clauses (ii) and (iii). *Ibid.* No other change was discussed or made to Section 1640(a)(2)(A).

It is nonsensical to conclude that Congress's special concerns about a certain subset of consumer loans – which it dealt with by doubling the minimum and maximum statutory liability for that subset – caused it silently to *eliminate* the cap on liability for all other consumer loans. But this is the conclusion reached by the courts below – in the case of the Fourth Circuit majority, in full recognition that it likely was doing violence to Congress's intent: "It could well be, as Judge Gregory concludes, that Congress did not intend to alter the statutory cap applicable under subparagraph (A)(i) when it amended the statute in 1995." Pet. App. 13a.

Respondent's apparent view of subparagraph (A), that the *1976* amendments (again, silently) removed the cap on liability for consumer loans (see note 8, *supra*), is even less reconcilable with Congress's clear intent in the 1995 amendments. For, if

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the legislative history of the 1976 amendments or with the meaning of the precise drafting term "subparagraph." As discussed further *infra*, that view is even less tenable in light of the legislative history of the 1995 amendments.



the $1000 liability cap was eliminated in 1976, Congress's special concerns about creditor abuses in the subset of consumer loans dealt with in clause (iii) caused Congress to *limit* liability, from a potential of tens of thousands of dollars when uncapped (as in this case), to $2000 under Section 1640(a)(2)(A)(iii). This is a non sequitur, in view of the unambiguous goal to "increase[] the statutory damages available in closed end credit transactions secured by real property or a dwelling" (H.R. REP. NO. 104-193, at 99).

A brief glance at Congress's other activity at the time that it considered and enacted the Truth in Lending Act Amendments of 1995 demonstrates that – just as in 1974 and 1976 – Congress knew exactly what it meant when it preserved the word "subparagraph" in Pub. L. No. 104-29, rather than changing the word to "clause" (as would be required to support the interpretation urged by respondent and accepted by the court below). In a report on H.R. 1858, a bill containing several amendments that ultimately became part of Pub. L. No. 104-29, the House of Representatives Committee on Banking and Financial Services myriad times employed the designations "paragraph," "subparagraph," and "clause," in manners consistent with the definitions of those terms in the *Data Dictionary* (see pp. 13-14, *supra*) and with the use of "subparagraph" in TILA. See, *e.g.*, H.R. REP. NO. 104-193, at 28 (amending a statutory section "by redesignating clauses (iii) and (iv) (as amended by subparagraph (A) of this paragraph) as clauses (i) and (ii)").

Indeed, Congress again showed that it knew how specifically to redesignate a "subparagraph" as a "clause," if it chose to do so. See H.R. REP. NO. 104-193, at 34 (amending a different statutory section "by redesignating subparagraphs (A), (B), and (C) as clauses (i), (ii), and (iii), respectively, and moving the left margins of such clauses 2 ems to the right"). Significantly, neither in the proposed amendments to Section 1640 contained in H.R. 1858 (see H.R. REP. NO. 104-193, § 111, at 9), nor in the version ultimately passed in Pub. L. No. 104-29, did Congress change the word "subparagraph" to "clause."

4. Congress's intent in 1968, 1974, 1976, and 1995 was crystal clear, and is amply demonstrated by considering the interplay of statutory liability caps under subparagraph (A). The same result also is reached if the Court considers the statutory minimum liability in subparagraph (A), which is $100 for clauses (i) and (ii), and $200 for clause (iii). See p. 3, *supra*. There is no dispute that Congress enacted in 1968 a $100 minimum liability for consumer loan transactions. See 1968 U.S.C.C.A.N. at 1976. As this Court held in *Mourning* v. *Family Pubs. Serv., Inc.*, 411 U.S. 356, 376 (1973), the $100 minimum liability "allow[ed] imposition of a civil penalty in cases where no finance charge is involved but where a regulation requiring disclosure has been violated. * * * [I]mposition of the minimum sanction is proper in cases such as this, where the finance charge is nonexistent or undetermined." The Seventh Circuit considered a similar situation in *Strange*, in which double-the-finance-charge liability was $54.72 – *less* than the $100 minimum. See 129 F.3d at 945. Under the interpretation urged by respondent, and accepted by the court below, no longer is there any significant incentive for borrowers in small consumer loan transactions to pursue TILA remedies against creditors. This result is directly antithetical to the entire purpose of the statutory minimum civil liability provision.

C. The panel's reading of Section 1640(a)(2)(A) inevitably would yield untenable results, when compared with indisputable interpretations of other TILA liability provisions. This Court requires an examination of how the section operates with the rest of the statutory scheme (*Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)):

> Although the State's hypertechnical reading of the nondiscrimination clause is not inconsistent with the language of that provision examined in isolation, statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.



In *Davis*, an 8-1 decision, this Court thought it "implausible at best * * * that Congress consented to discriminatory taxation of the pensions of retired federal civil servants while refusing to permit such taxation of current employees." *Id.* at 810. Without "[any]thing in the statutory language or even in the legislative history suggest[ing] this result," the Court would not accept such an implausible interpretation. *Ibid.* Of course, this case is easier: respondent's interpretation of Section 1640 is readily overborne by the plain language that Congress employed in the section. See pp. 12-16, *supra*. But, even if it were not, an interpretation of subparagraph (A) based on the fact that the $100/$1000 provision is separated "only by a comma" (Br. in Opp. 10) from clause (ii) is insupportable based on the violence done to the overall TILA liability scheme.

1. Under respondent's interpretation, an innocent, technical violation of TILA in a car loan could produce substantial statutory punitive liability under clause (i) of subparagraph (A). But an egregious violation – or multiple violations (see 15 U.S.C. § 1640(g)) – of TILA in the case of a car lease could only produce, at the most, $1000 in statutory damages under clause (ii). Those results could occur regardless of – and in fact, inversely to – the relative culpability of the creditor. This result undermines Congress's intent as expressed in the legislative history of the 1976 amendments that violations in leases "represent a civil penalty equivalent in dollar amount to that imposed on other creditors." 1976 U.S.C.C.A.N. at 438. It also ignores Justice Holmes's admonition to "us[e] common sense in construing laws a saying what they obviously mean." *Roschen* v. *Ward*, 279 U.S. at 339.

2. Comparing loans subject to clause (i) with those subject to clause (iii) produces similar results. If a consumer creditor enters into a loan transaction secured by a dwelling with finance charges running tens of thousands of dollars, the creditor's TILA liability is $2000 plus attorneys fees, even if the creditor multiply violates TILA and Regulation Z. But if a member of *amici* lends money for the purchase of an automobile and makes

an innocent error in calculating the cost of credit, the creditor's liability under TILA is uncapped – and, as in this case, potentially much greater than on the home loan. This makes no more sense than the scenario above, and directly conflicts with Congress's stated goal to "increase[] the statutory damages available in [the specific] transactions" identified in clause (iii). H.R. REP. NO. 104-193, at 99.

3. A similarly untenable result obtains in the class action context. Class-action recovery is capped at "$500,000 or 1 per centum of the net worth of the creditor." Section 1640(a)(2)(B). Under the interpretation of subparagraph (A) urged by respondent, and accepted by the panel majority below, an error in TILA disclosures in one loan transaction might subject a creditor to uncapped liability of two times the finance charge. On the other hand, if that same creditor has a net worth of $2.5 million, and makes the same error in *multiple* loan transactions involving different borrowers, its liability is capped at one percent of its net worth, or $25,000. The liability in the individual action in this case is the same as the creditor's total exposure in the class action – and importantly, there is "no minimum recovery * * * as to each member of the class." Section 1640(a)(2)(B).

4. The criminal penalties under 15 U.S.C. § 1611 are yet another demonstration of the absurd result of the panel's interpretation of subparagraph (A). This Court has treated the statutory civil liability provisions of Section 1640 as "modest" in nature. See *Mourning*, 411 U.S. at 376 ("Since the civil penalty prescribed is modest * * *, we need not construe this section as narrowly as a criminal statute providing graver penalties, such as prison terms."). But the maximum *criminal* fine under Section 1611 is $5000, approximately one-fifth of the civil liability imposed in this case. It cannot be that the "modest" civil penalty, which can be imposed without any proof of bad intent, exceeds the maximum punitive monetary liability, which can be imposed only on proof beyond a reasonable doubt of "willful[ness] and know[ledge]." Section 1611.



5. Finally, the result reached below eviscerates the $100 minimum liability of subparagraph (A) as it applies to most consumer loans. In all cases where the finance charge is less than $50 (such that twice the charge is less than $100), or "no finance charge is involved," Congress's intent to impose a modest civil penalty in all consumer loan and lease transactions (*Mourning*, 411 U.S. at 376) is undermined. This Court should not countenance an interpretation of TILA that writes this provision out of the Act. See *Alaska Dep't of Env'tl Conservation* v. *EPA*, 124 S. Ct. 983, 1002 n.13 (2004) ("[A] cardinal principle of statutory construction [is] that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotations omitted).

## II. The Harmful Impact that the Decision Below Would Have on the Consumer Lending Industry Cannot Be Reconciled with Congress's Intent as Expressed in TILA or with Responsible Public Policy

A. *Amici* discussed in their brief supporting the petition for certiorari the magnitude of the industry threatened by the holding below. See Brief of the American Bankers Ass'n *et al.* 9-16. The sheer volume of automobile loans yearly that implicate the rule of the courts below is staggering. On very conservative estimates, increased exposure to consumer creditors, like members of *amici*, runs to more than a billion dollars yearly, even at the very low average interest rates in today's struggling economy. *Id.* at 10. On a per-institution basis, some 10% of a creditor's total assets are implicated by auto loans. *Id.* at 11. And auto loans tell only a part of the picture. $233 billion in debt in home-equity lines of credit, at an average interest rate of 7%, is covered by clause (i) (because lines of credit are open-ended, not closed-ended as required for clause (iii)). *Id.* at 12. As of March 5, 2004, total consumer credit outstanding was more than $2 trillion. See *Federal Reserve Statistical Release*

*G.19: Consumer Credit* (March 5, 2004), available at http://www.federalreserve.gov/releases/g19/Current/.

Given the vastness of the industry affected by this case, the panel majority's cavalier suggestion that Congress can simply amend TILA to correct the Fourth Circuit's error violates any concept of responsible public policy. See Pet. App. 13a ("Of course, it goes without saying, if Congress enacted into law something different from what it intended, then it can simply amend the statute to bring the statute in line with congressional intent."). Consumer spending is vital to the U.S. economy – in recent years making up more than two-thirds of total economic activity. See *Consumer Confidence Jumps*, CNN MONEY (Nov. 25, 2003), available at http://money.cnn.com/2003/11/25/news/economy/confidence/index.htm. In 2003, consumer spending made up $7.75 trillion of a total GDP of $10.9 trillion. *News Release: Gross Domestic Product* (Mar. 25, 2004), available at http://www.bea.gov/bea/newsrel/gdpnewsrelease.htm. For this reason, economists and policymakers look to consumer confidence indices when setting economic policy and predicting future economic activity. See *Gross Domestic Product Jumps Again, Raising Hopes for Durable Recovery*, THE DETROIT NEWS (Feb. 28, 2004), available at http://www.detnews.com/2004/business/0402/28/business-76973.htm.

Of consumer spending, consumer credit makes up substantial percentages. As of 1997, credit card spending made up some 22% of overall consumer spending. See DAVID EVANS & RICHARD SCHMALENSEE, PAYING WITH PLASTIC 91 (2000). Assuming that same percentage in 2003, credit card spending approximated $1.7 trillion last year. All of this credit activity may be diminished if the cost to creditors from potential TILA liability increases dramatically. For this reason, victories for TILA plaintiffs under the panel's new rule would be harmful to consumers nationwide because of increases in the cost of credit. The potential for harm to the national economy from the panel's new rule should not be ignored.



B. It is no answer to say that the increased civil liability advances Congress's goal of increasing disclosures under TILA. Even if that were true, this Court disapproves construing statutes to require such unbridled pursuit of a single purpose. See *PBGC* v. *LTV Corp.*, 496 U.S. 633, 646-647 (1990) ("'[N]o legislation pursues its purposes at all costs * * * – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.'") (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam)).

But also, no matter how draconian the penalty, the complexity of the disclosure requirements under TILA and Regulation Z virtually guarantees that technical violations of their provisions will occur. Throughout the history of TILA, Congress has been aware of the challenges the "highly technical" rules pose to creditors:

> Creditors * * * have encountered increasing difficulty in keeping current with a steady stream of administrative interpretations and amendments, as well as highly technical judicial decisions. There is also evidence that many creditors have sincerely tried to comply with the Act but, due to its increasing complexity and frequent changes, have nonetheless found themselves in violation and subject to litigation.

S. REP. NO. 96-73, 96th Cong., 1st Sess. (1979), reprinted in 1980 U.S.C.C.A.N. 280, 281. Although Congress amended TILA in 1980 in part to rectify this problem, compliance is still a difficult task. A former Chairman of the Federal Deposit Insurance Corporation stated just nine years ago that "the complexity of Regulation Z is such that the FDIC cited more than 2,700 of the 3,500 institutions that we examined in 1994 for at least one violation." *Hearings on S. 650 Before the Subcomm. on Financial Institutions and Regulatory Relief of the Senate Comm. on Banking, Housing and Urban Affairs*, 104th Cong., 1st Sess., at 9 (1995) (statement of FDIC Chairman Ricki Helfer). As a result, the cost to financial institutions of

complying with TILA is substantial. "[A] few regulations are clearly very costly. Truth in Lending, for example, appears in more than one study as a major source of regulatory cost." Gregory Elliehausen, *The Cost of Bank Regulation: A Review of the Evidence*, Federal Reserve Staff Study 171, at 29 (1998), available at http://www.federalreserve.gov/pubs/staffstudies/1990-99/ss171.pdf.

As courts and commentators have observed, TILA and Regulation Z together create something of a "trap for the unwary creditor." See John W. Edmonds, III & George W. Taylor, Jr., *Truth and Consequences*, 35 WASH. & LEE L. REV. 367, 391 (1978) ("[TILA] was a well-intentioned statute. Unfortunately, it seems to serve mostly as a trap for the unwary creditor, increasing the cost of credit extensions and eliminating the small credit extender from the market as opposed to achieving benefits for the consumers on whose benefit it was enacted."); see also Pet. 18 (discussing authorities). Respondent's counsel observes on his Internet site that "[n]early every car transaction contains one or more violations of a statute or regulation."[9]

Importantly, the massively increased TILA liability that was brought about by the panel's decision will not result in improved disclosures by creditors like members of *amici*. Those institutions already are largely successful at meeting their TILA obligations; and those violations that do occur are the result of the hyper-technical nature of the statutory and regulatory requirements and will not be cured by imposing greater punishment. And TILA has already had the effect that it was designed to have, with the universal recognition of the $1000 cap on statutory liability. The first decade of enforcement saw thousands of TILA claims filed yearly, but by 1985 that number had dwindled to 245. See ROHNER & MILLER, *supra*, ¶ 12.01, at 785 n.1. Yet that number will surely rise –

[9] See http://www.alexandriacitywebsite.com/blankingship.htm. Counsel's Internet website also advertises that these "statutes and regulations" can be used "to escape a bad car deal."



perhaps dramatically – if the uncapped liability envisioned by the decision below for no-harm TILA violations is unleashed. So respondent and others like him would be the only beneficiaries of the panel's rule, and the cost of their windfalls would be borne by other consumers. And the windfall for plaintiffs, and for their counsel, would be won at the risk of great harm the consumer credit industry – and, thereby, to the national economy.

* * * * *

To hold that the Fourth Circuit correctly construed Section 1640 to provide for unlimited civil penalties for those loans covered by clause (i), this Court must *both* "presum[e] that 'the legislature was ignorant of the meaning of the language it employed,'" *BedRoc Limited, LLC* v. *United States*, 124 S. Ct. 1587, 1595 (2004) (plurality opinion) (quoting *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1883)), *and* fail to "'seek guidance from every reliable source,'" *BedRoc*, 124 S. Ct. at 1598 (Stevens, J., joined by Souter and Ginsburg, JJ., dissenting) (quoting AHARON BARAK, JUDICIAL DISCRETION 62 (Y. Kaufmann transl. 1989)). The Court should not do so. Both the precise legislative drafting term "subparagraph" and all indicia of legislative intent and responsible public policy preclude the conclusion reached below, and it should be reversed.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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